ACTA and Copyright in EU: A Love or Hate Relationship?

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I. Short history about ACTA

The Anti-Counterfeiting Trade Agreement (ACTA) constitutes one of the most debated copyright issues in the last years. ACTA aims to change the international framework providing a model for effectively combating global proliferation of commercial scale counterfeiting and piracy. The objective of the new plurilateral[1] treaty is to improve the global standards for the enforcement of intellectually property rights (IPRs) in the international sphere and to become the new international standard for intellectual property enforcement.

The idea of this Agreement started in June 2005, when it was introduced by the Japanese Prime Minister Koizumi at the meeting of Group of Eight (G8) in Scotland.[2] The proposal for an anti-counterfeiting treaty was officially presented at the Second Global Congress to Combat Counterfeiting & Piracy[3] in 2005 and it was included in the Lyon Declaration,[4] adopted by the participants, where further consideration of the "*Japan's proposal for a new international treaty*" was recommended. The issue was reintroduced by Japan in the following Third Global Congress (2007 in Geneva)[5] and it was once more suggested to "*Explore the proposal by the Government of Japan to develop an international treaty on the manufacturing and distribution of counterfeit and pirated goods, as well as consumer education*."[6] The issue of a new anti-counterfeiting treaty was discussed again in the next meeting of the G8 in Russia in 2006, where they reaffirmed their "*commitment to strengthening individual and*

[1] A plurilateral agreement implies that member countries would be given the choice to agree to new rules on a voluntary basis. This contrasts with the multilateral agreement, where all members are party to the agreement (read more at: http://wiki.answers.com/Q/What_is_the_difference_between_Plurilateral_agreement_and_Multilateral_agreement#ixzz1HQDyX2rc /accessed 01.09.2011). Etymologically, plurilateral and multilateral are synonyms for an agreement among more than two parties. In some international organizations, however, plurilateral is used to distinguish an agreement made among only some members of the whole from the multilateral agreements among all members (read more at: What Is a Plurilateral Agreement? | eHow.com http://www.ehow.com/facts_7633632_plurilateral-agreement.html#ixzz1HQEKsmZ0 /accessed 01.09.2011).

[2] Japan proposes new IP Enforcement Treaty, IP Watch (15 November 2005) online at http://www.ip-watch.org/weblog/2005/11/15/japan-proposes-new-ip-enforcement-treaty/ /accessed 01.09.2011and Yu, Peter K., Six Secret (and Now Open) Fears of ACTA (June 14, 2010). SMU Law Review, Vol. 64, 2011 online at http://ssrn.com/abstract=1624813 //accessed 01.09.2011, p. 4.

[3] See more information at: http://ccapcongress.net/2_Lyon.htm /accessed 01.09.2011.

[4] The Lyon Declaration, 19 November 2005 online at http://ccapcongress.net/archives/Lyon/files/OutcomesStatement20051115.pdf /accessed 01.09.2011, p. 4.

[5] See more information at http://ccapcongress.net/3_Geneva.htm /accessed 01.09.2011.

[6] Suggestions Extending from the Third Global Congress, Geneva, January 30 and 31, 2007 online at http://ccapcongress.net/archives/Geneva/Files/Congress%20Recommendations_Geneva%20Jan%202007.pdf /accessed 01.09.2011, p. 3.

collective efforts to combat piracy and counterfeiting, especially trade in pirated and counterfeit goods".[7] But the G8 was not a suitable forum for furthering any discussion on this subject, since it did not have any norm-setting capability. On the contrary, suitable and competent for such a discussion would be the World Intellectual Property Organization (WIPO) or the World Trade Organizations (WTO) or even the World Customs Organization (WCO). Finally, neither of those Organizations became the hosting forum of ACTA and the text was developed outside of them. This fact was a point of criticism against ACTA but not completely justified. Since the conclusion of Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement in 1994 (WTO) and the WIPO Treaties in 1996 (WIPO), the developed countries were demanding a higher level of protection of intellectual property rights (IPRs). These efforts were expressed in proposals for 'in-depth discussion' on enforcement issues made at the TRIPs Council by the European Community (2006)[8] (with formal support from Japan, Switzerland and the United States)[9], by the United States (2007)[10] and Switzerland (2007).[11] All those attempts met strong resistance by the less developed countries, in most of the cases based on procedural grounds. The real reason though was that the less developed countries already had a hard time with the IP standards and the obligations stemmed from TRIPs and did not want a higher level for protection for IPRs.[12] Similar obstacles faced the efforts of the developed countries to expand the intellectual property enforcement in WIPO. Although the longest-standing international institution dealing with intellectual property, WIPO, is supposed to be the core of the international intellectual property system, over the last years this has fallen into question.[13] The adoption of Development Agenda for WIPO and specially the Recommendation 45, which calls on WIPO "*to approach intellectual property enforcement in the context of broader societal interests and especially development oriented concerns*",[14] and the establishment of the Advisory Committee on Enforcement (ACE)[15] were not enough and certainly not encouraging, since norm-setting was excluded explicitly from the Mandate of the ACE. No essential development was shown despite the efforts of some members to the contrary. The

[7] Statement on Combating IPR Piracy and Counterfeiting, July 16, 2006 online at http://en.g8russia.ru/docs/15.html /accessed 01.09.2011.

[8] TRIPS Council, Communication from the European Communities, Enforcing Intellectual Property Rights: Border Measures, IP/C/W/471 (June 9, 2006). See also two earlier proposals TRIPS Council, Communication from the European Communities, Enforcement of Intellectual Property Rights, IP/C/W/468 (March 10, 2006); TRIPS Council, Communication from the European Communities, *Enforcement of Intellectual Property Rights*, IP/C/W/448 (June 9, 2005).

[9] TRIPS Council, Joint Communication from the European Communities, United States, Japan and Switzerland, Enforcement of Intellectual Property Rights, IP/C/W/485 (November 2, 2006).

[10] TRIPS Council, Communication from the United States, Enforcement of Intellectual Property Rights (Part III of the TRIPS Agreement): Experiences of Border Enforcement, IP/C/W/488 (Jan. 30, 2007).

[11] TRIPS Council, Communication from Switzerland, Enforcement of Intellectual Property Rights: Communication and Coordination as a Key to Effective Border Measures, IP/C/W/492 (May 31, 2007).

[12] See analytically Yu, p. 10f.

[13] ACTA was not the only threat to the leadership of WIPO in the world IP system. The Universal Copyright Convention was established under UNESCO in 1952 and TRIPs under WTO in 1994, Bannerman, Sara. 2010. WIPO and the ACTA Threat. PIJIP Research Paper no. 4. American University Washington College of Law, Washington, DC (January 9, 2010) online at http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1004&context=research/accessed 01.09.2011.

[14] WIPO, The 45 Adopted Recommendations Under the WIPO Development Agenda online at http://www.wipo.int/ip-development/en/agenda/recommendations.html /accessed 01.09.2011.

[15] Information about the WIPO Advisory Committee on Enforcement online at http://www.wipo.int/enforcement/en/ace/ /accessed 01.09.2011 .

lack of any initiative and any progress in the field of IP enforcement forced developed countries to other fora and to other solutions, such as the conclusion of bilateral and – in the case of ACTA- of plurilateral agreements.

It was not until October 2007, when the first unofficial negotiations for ACTA took place.[16] The key negotiating parties were Japan, the United States and the European Union. The other negotiating Parties included Canada, Mexico, New Zealand, South Korea, and Switzerland.[17] Australia, Morocco, Singapore and the 27 members of the European Union joined later the negotiations.[18] The negotiations ended in October 2010 after 11 rounds.[19] The final text of ACTA includes six chapters. The Initial Provisions (Chapter I), where the Parties describe the nature and scope of the Agreement and its relationship to domestic laws and it includes definitions of terms used in the Agreement. In the second chapter, Legal Framework for Enforcement of Intellectual Property Rights, the Parties agree to provide various legal means to enforce IPRs (civil enforcement provisions dealing with issues such as damages, injunctions to stop further infringements, recovery of costs and attorneys' fees, and destruction of infringing goods, border measures, criminal enforcement, enforcement of intellectual property rights in the digital environment). In chapter III, Enforcement Practices**,** Parties agree to promote practices that contribute to effective enforcement of IPRs, such as specialization, data collection and analysis, internal coordination, and stakeholder consultation. Chapter IV, International Cooperation, provides that the Parties agree to cooperate to realize effective protection of IPRs. In chapter V, Institutional Arrangements, a committee is established not only to review the operation of the Agreement but to serve as a forum to discuss enforcement issues, as well as to handle any matter relating to the Agreement. In the last chapter, Final

[16] The first official round of negotiation took place in June 2008 in Geneva (border measures) online at http://trade.ec.europa.eu/doclib/docs/2008/june/tradoc_139085.pdf /accessed 01.09.2011.

[17] The United Arab Emirates participated in the first round of negotiations but it had not attended the subsequent rounds of negotiations.

[18] Ch. 6, Article 39, n. 17, p. 23 ACTA (text of 3.12.2010).

[19] Round 1: Geneva, Switzerland (June 2008) (border measures), Round 2: Washington, USA (July 2008) (border measures and civil enforcement of intellectual property rights, http://trade.ec.europa.eu/doclib/docs/2008/august/tradoc_140017.pdf /accessed 01.09.2011), Round 3: Tokyo, Japan (October 2008) (civil and criminal enforcement of intellectual property rights, http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_141203.pdf /accessed 01.09.2011), Round 4: Paris, France (December 2008) (criminal enforcement, international cooperation, enforcement practices, institutional arrangements, and internet distribution and information technology, http://trade.ec.europa.eu/doclib/docs/2009/january/tradoc_142118.pdf /accessed 01.09.2011), Round 5: Rabat, Morocco (July 2009) (international cooperation, enforcement practices, institutional arrangements, and transparency matters, http://trade.ec.europa.eu/doclib/html/144136.htm /accessed 01.09.2011), Round 6: Seoul, South Korea (November 2009) (enforcement of rights in the digital environment, criminal enforcement, and transparency matters, http://trade.ec.europa.eu/doclib/docs/2009/november/tradoc_145302.pdf /accessed 01.09.2011), Round 7: Guadalajara, Mexico (January 2010) (civil enforcement, border enforcement and enforcement of rights in the digital environment), Round 8: Wellington, New Zealand (April 2010) (civil enforcement, border measures, criminal enforcement and special measures for the digital environment), Round 9: Lucerne, Switzerland (http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146292.pdf /accessed 01.09.2011) (June 2010), Round 10: Washington, D.C., USA, August 2010 and Round 11: Tokyo, Japan (October, 2010), http://ec.europa.eu/trade/creating-opportunities/trade-topics/intellectual-property/anti-counterfeiting/ /accessed 01.09.2011).

Provisions, the Parties agree on matters concerning the signature and entry into force of the Agreement and on other technical matters.[20]

Another concern regarding ACTA was the lack of formal transparency in the negotiations process.[21] The first available draft of ACTA has leaked in January 2010,[22] while the first official draft of ACTA was not released until April 2010.[23] Some other drafts of ACTA were leaked afterwards.[24] A consolidated draft was released in October 2010[25] and the nearly identical draft was released on December 3, 2010.[26] The Commission published in May 2011 a new version of ACTA,[27] while the official text has been published on August 23, 2001, with Document 12196/11.[28] The lack of transparency and the secrecy of ACTA negotiations was heavily criticized by the European Parliament, NGOs and other civil liberties groups. The European Parliament reacted in this respect issuing two contradictory Resolutions: one on March 10, 2010[29] and a second one on November 24, 2010.[30] In the first Resolution the European Parliament not only expressed "*its concern over the lack of transparent progress in the conduct of the ACTA negotiations*" but clearly threatened "*to take suitable action, including bringing a case before the Court of Justice*" against the Commission, which was negotiating on behalf of the EU, if it did not share more information about all stages of the negotiations. On the contrary, in November 2010, the European Parliament welcomed the controversial intellectual property treaty as "*a step in the right direction*".

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[20] ACTA fact sheet and guide to public draft text, Office of the United States Trade Representative online at http://www.ustr.gov/about-us/press-office/fact-sheets/2010/acta-fact-sheet-and-guide-public-draft-text /accessed 01.09.2011.

[21] See analytically, Geist, Michael, ACTA Guide Part III: Transparency and ACTA secrecy online at http://www.mp3newswire.net/stories/0102/ACTA-guide-3.htm /accessed 01.09.2011.

[22] ACTA Draft – January 18, 2010 online at http://euwiki.org/ACTA/Informal_Predecisional_Deliberative_Draft_18_January_2010 /accessed 01.09.2011.

[23] Official Consolidated Text – April 21, 2010 online at http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf /accessed 01.09.2011.

[24] ACTA July 2010 draft online at http://www.laquadrature.net/en/new-acta-leak-2010-07-13-consolidated-text-luzern-round /accessed 01.09.2011 and the draft of August 2010 online at http://keionline.org/sites/default/files/acta_aug25_dc.pdf /accessed 01.09.2011.

[25] Consolidated Draft of October 2, 2010 online at http://trade.ec.europa.eu/doclib/docs/2010/october/tradoc_146699.pdf /accessed 01.09.2011. In November a finalized text of the Treaty subject to legal review was released online at http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc_147002.pdf /accessed 01.09.2011.

[26] Online at http://trade.ec.europa.eu/doclib/docs/2010/december/tradoc_147079.pdf /accessed 01.09.2011. Following legal verification of the final text, the proposed agreement will then be ready to be submitted to the parties' competent authorities to undertake the relevant domestic processes.

[27] Online at http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147937.pdf /accessed 01.09.2011. The text included minor changes. It was removed: "3 December 2010″ (the date the prior "final" text was made) and it was changed: "*This Agreement shall remain open for signature by participants in its negotiation,17 and by any other WTO Members the participants may agree to by consensus, from 31 March 2011 until 31 March 2013*" to: "*This Agreement shall remain open for signature by participants in its negotiation,17 and by any other WTO Members the participants may agree to by consensus, from 1 May 2011 until 1 May 2013*."

[28] Online at http://register.consilium.europa.eu/pdf/en/11/st12/st12196.en11.pdf /accessed 01.09.2011.

[29] European Parliament Resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations online at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0058+0+DOC+XML+V0//EN /accessed 01.09.2011.

[30] European Parliament Resolution of 24 November 2010 on the ACTA online at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0432+0+DOC+XML+V0//EN /accessed 01.09.2011.

The decision of the European Ombudsman[31] justified the fact that ACTA had been negotiated as a trade agreement and not as an enforcement treaty. The disclosure of the documents would be "*detrimental to the international relations between EU and those (negotiating) countries*", "*it would be prejudicial to the EU's interest in the conduct of the negotiations*" and "*would have a negative effect on the climate of confidence in the ongoing negotiations, and that open and constructive cooperation might be hampered*." This secretive approach increased the possibilities for a more successful negotiation, shielded from external influence and pressure, *i.e.* political implications from the capitals and oppositions from civil society groups.

Notwithstanding those implications by releasing ACTA documents, still the other side supports that ACTA is not *per se* a trade agreement[32] that would justify such a degree of secrecy but it focuses primarily on intellectual property enforcement and this does not deserve the same type of protection as a trade agreement, despite the opposite official position of the European Commission.[33]

In any case it has to be admitted that even in a later stage, transparency made its entry during the ACTA negotiations, since in one way or another several drafts of the Agreement were given out before its finalization and there were some spectacular changes in certain points that gathered the most negative comments. Those changes came mainly due to the negotiations of the Parties but also till to a certain point due to the pressure of the different civil society organizations. Besides, total transparency from the beginning of the negotiations would not be so helpful, since it is common at early stages of a Treaty's negotiation not to have a text but a pile of proposals, that need a great deal of elaboration before starting to form a consolidated text.

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[31] European Ombudsman's decision on complaint 90/2009/(JD)OV (23.07.2010) relating to denied access to ACTA documents online at http://people.ffii.org/~ante/acta/ombudsman-2010-7-23.pdf /accessed 01.09.2011. Relevant is also an informal agreement among ACTA parties, the 'Maintaining Confidentiality of Documents', expressing the understanding that intergovernmental negotiations dealing with issues that have an economic impact may not necessarily take place in public and that negotiations are bound by a certain level of discretion online at http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBgQFjAA&url=http%3A%2F%2Fwww.wcl.american.edu%2Fpijip%2Fdownload.cfm%3Fdownloadfile%3D7FC54F05-A112-5891-1CA6A91F7563BF11%26typename%3DdmFile%26fieldname%3Dfilename&ei=yy-UTeX3I4aChQei1oDwCA&usg=AFQjCNFC7X1i7cXxj1hK497SnAbVZ5yWtA /accessed 01.09.2011.

[32] ACTA does not intend to facilitate or promote trade, it does not set preconditions for trade and it does not remove barriers to trade and therefore, the claims to be a trade agreement are weak, unless we adopt a very broad conception of 'trade agreements'. See analytically Weatherall, Politics, Compromise, Text and the failures of the Anti-Counterfeiting Trade Agreement, Sydney Law Review Vol. 33, p. 233.

[33] Yu, p. 22-23. See the answer that was given by Mr De Gucht on behalf of the Commission (21.1.2011) E-8847/2010 online at http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2010-8847&language=EL /accessed 01.09.2011: "*Regarding the first question about whether ACTA qualifies as a trade agreement, the issue that needs to be settled is under which competences the Union can potentially ratify the Agreement. It is clear that the EU's competence under the common commercial policy (Article 207 TFEU), which includes 'the commercial aspects of intellectual property', provides an EU competence for the matters regulated in ACTA. In this sense, therefore, ACTA can be considered a 'trade' agreement. … As regards transparency, trade agreements, based on Article 207 TFEU, are subject to the same rules on transparency as applicable to other negotiations, but Article 207 requires that the Parliament be kept fully informed. International negotiations are always subject to a certain degree of confidentiality because the parties need a minimum level of confidentiality to feel comfortable enough to make concessions or to try different options*".

Apart from the lack of transparency, another major issue in the European Union was whether the provisions of ACTA are in line with the current EU IPRs regime and compatible with the relevant *acquis communautaire*. This is also the subject of the present paper. The official position of the European Commission and of the European Parliament[34] is that ACTA is in line with current EU regime or even less demanding and therefore the Agreement is already fully implemented by the current EU legislation, and it fully respects fundamental rights, freedoms and civil liberties, such as the protection of personal data.[35]

According to the Commission ACTA is about enforcement of existing law and not about substantive law. *Acquis communautaire* is about substantive law and this is why it is remains unchanged. Additionally, ACTA builds mainly upon the main international standards, which are set by TRIPs. ACTA takes TRIPs Agreement as a common ground, defines additional obligations of its contracting parties[36] and provide enforcement tools where TRIPs are considered to fall short.[37]

Nevertheless, a group of prominent law professors seem to refute European's Commission claim that ACTA is compatible with existing European legal framework. The signatories of the 'Opinion of European Academics on the Anti-counterfeiting Trade Agreement' (20.01.2011)[38] assert that: "*Contrary to the European Commission's repeated statements and the European Parliament's resolution of 24 November 2010, certain ACTA provisions are not entirely compatible with EU law and will directly or indirectly require additional action on the EU level*".

A few months afterwards in April 2010 the European Commission's Directorate-General for Trade has released a working paper that responds to this widely cited Opinion Document. The Commission in its point-by-point rebuttal holds that even though ACTA is not entirely consistent with existing EU law, the compatibility of ACTA with the *acquis communautaire* is not problematic.

Additionally, another Study commissioned by the European Parliament Committee on International trade was conducted by the Directorate-General for External Policies of

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[34] European Parliament Resolution of 24 November 2010 on the Anti-Counterfeiting Trade Agreement (ACTA) online at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0432+0+DOC+XML+V0//EN /accessed 01.09.2011.

[35] See answers given by Mr De Gucht on behalf of the Commission at parliamentary questions online at http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2010-8847&language=EL, http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2010-9179&language=EN and the Debate on ACTA on 20 October 2010 online at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20101020+ITEM-016+DOC+XML+V0//EN /all accessed 01.09.2011

[36] Article 1 par. 1 ACTA. Metzger Axel, A Primer on ACTA: What Europeans Should Fear about the Anti-Counterfeiting Trade Agreement, 1 (2010) JIPITEC 109, par. 5.

[37] Shayerah Ilias, The Proposed Anti-Counterfeiting Trade Agreement: Background and key issues, CRS Report for Congress, March 12, 2010, p. 1. See analytically the provisions of ACTA that provide value compared to existing international standards and in particular TRIPs at EUROPEAN COMMISSION Directorate-General for Trade, 3 November 2010 "LIMITED" NOTE FOR THE ATTENTION OF THE INTA COMMITTEE, ANNEX 1 online at http://www.laquadrature.net/wiki/ACTA_EC_WTO_TRIPS_20101109 /accessed 01.09.2011.

[38] Online at http://www.iri.uni-hannover.de/tl_files/pdf/ACTA_opinion_110211_DH2.pdf /accessed 01.09.2011.

the Union.[39] The Study addresses two key questions regarding ACTA: whether it is in conformity with the EU *acquis* and with the existing international obligations of the EU and its member states.

Finally, what is the case? Is the new Anti-counterfeiting agreement a step forward to combating effectively counterfeiting and piracy, enhancing the legal framework by establishing 'a new standard of IP enforcement' and improving international cooperation in IPR enforcement, fully in line with the European *acquis* or is it a new instrument that conflicts with civil liberties and legitimate economic concerns not based on IPRs, blemished by the murky negotiation history of ACTA in many aspects not in conformity with the European IP standards and that's why not to be ratified by the Council and the European Parliament? And coming to the title of the paper: ACTA and Copyright in EU: Is a Love or a Hate Relationship?

In order to answer this question we will go through the chapters of ACTA and we will examine them carefully.

II. Comments on the ACTA Chapters

1. Definitions

In ACTA "*pirated counterfeited goods means any goods which are copies made without the consent of the rightholder or person duly authorized by the rightholder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country in which the procedures set forth in Chapter II (Legal Framework for Enforcement of Intellectual Property Rights) are invoked*."[40]

ACTA's references to 'pirated copyright goods' though could be misleading and not politically correct. The use of the term 'piracy' as a synonym for copyright infringement is not only technically incorrect but also highly prejudicial creating a false equivalence between the violation of an economic right and a dangerous crime involving physical violence. Therefore, the term 'piracy' should have been replaced with the more appropriate term of 'copyright infringement'.[41] In European directives 'piracy' is never used in the context of 'copyright infringement'.

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[39] The Anti-Counterfeiting Trade Agreement (ACTA): An Assessment, European Parliament – Directorate-General for External Policies/Policy Department online at http://www.laquadrature.net/files/INTA%20-%20ACTA%20assessment.pdf /accessed 01.09.2011, p. 51.

[40] ACTA, Article 5. In TRIPs 'pirated copyright goods' were defined as infringing "*under the law of the country of importation*", Article 51 ("'*pirated copyright goods' shall mean any goods which are copies made without the consent of the rightholder or person duly authorized by the rightholder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation*").

[41] Concerns with April 2010 ACTA Text (23.04.2010) online at http://www.librarycopyrightalliance.org/bm~doc/consolidatedtextcomments423.pdf /accessed 01.09.2011.

Both in TRIPS and in ACTA the language is awkward concerning cases where goods are put on the market lawfully but without the permission of the right owner, such as in the case of a compulsory license or an exception to rights. The TRIPS definitions, in the context of Suspension of Release by Customs Authorities, refer specifically to the border measures, while the ACTA definitions are more general.[42]

The European Commission pushed for some last changes, as it was concerned that the original definition would create obligations to destroy goods that were not infringing rights in EU. Exceptions and limitations, such as private copy rules in national rules could disallow procedures from jurisdictions where no such limitations exist.[43]

Another important point worth to be mentioned in this Section of General Definitions is the notion of 'person'. According to ACTA (Article 5) 'person' means a natural or a legal person. This definition heighten liability for companies accused as direct infringers, such as search engines and give the possibility to the rightholders to go after them for direct infringement. And for the purposes of ACTA 'rightholders' include also "*a federation or an association having the legal standing to assert rights in intellectual property*" and not only the ones that created the infringed good.[44]

Nothing in this General Definitions Section though seems to be contrary to the European *acquis*.

2. Civil enforcement

Injunctions

After an article that contains some general rules on civil procedures (Article 7 ACTA) - similar to Article 3 of Directive 2004/48[45] (hereinafter the Enforcement Directive) - the first civil remedy of ACTA concerns injunctions. According to Article 8 par. 1 ACTA "*Each Party shall provide that, in civil judicial proceedings concerning the enforcement of intellectual property rights, its judicial authorities have the authority*[46] *to issue an order against a party to desist from an infringement, and inter alia, an order to that party or, where appropriate, to a third party over whom the relevant judicial authority exercises jurisdiction, to prevent goods that involve the infringement of an intellectual property right from entering into the channels of commerce."* The wording presents similarities to the corresponding Article 11 of the

[42] KEI, The October 2, 2010 version of the ACTA text online at http://keionline.org/node/962 /accessed 01.09.2011.
[43] Ermert, 'Final final' ACTA Text Published; More Discussion Ahead For EU online at http://www.ip-watch.org/weblog/2010/12/06/%E2%80%98final-final%E2%80%99-acta-text-published-more-discussion-ahead-for-eu/ /accessed 01.09.2011. See also regarding the definition of 'pirated copyright goods' later in the section Other remedies.
[44] Kaminski, Margot, 2011. An overview and the Evolution of the Anti-Counterfeiting Trade Agreement, PIJIP Research Paper no. 19. American University Washington College of law, Washington, DC, p. 10.
[45] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, OJ L 157, 20.04.2004, p. 45-86.
[46] The function of the words 'have the authority' is to address the issue of judicial discretion not that of general availability (see Interpretation of Article 44 TRIPs online at http://www.wto.org/english/res_e/booksp_e/analytic_index_e/trips_03_e.htm#article44B /accessed 01.09.2011).

Enforcement Directive.[47] The difference is that ACTA adds '*inter alia*' and consequently has a broader formulation of the third party including also third parties that are not intermediaries. This may impact access to ICT sector. Another difference is that in the Enforcement Directive exists also the possibility of Article 12, which provides that under certain circumstances (in appropriate cases, if the infringer asks for it, if that person acted unintentionally and without negligence, if execution of the measures in question would cause him/her disproportionate harm and if pecuniary compensation to the injured party appears reasonably satisfactory) the competent judicial authorities may order pecuniary compensation instead of applying the injunction.[48] The possibility of applying pecuniary compensation as an alternative to injunction does not exist in ACTA explicitly. Nevertheless, there is also no prohibition to a Party of ACTA to supply the judicial authorities with the authority to order pecuniary compensation as an alternative and consequently the pecuniary compensation option provided in the Enforcement Directive remains and it is fully in line with ACTA.[49] In any case it has to be noted that this option of Article 12 of the Enforcement Directive is optional and that it can be applied only in exceptional cases. But most importantly this possibility of Article 12 of the Enforcement Directive mirrors the general principle of proportionality, which is also respected in ACTA and it is applied to all enforcement measures according to Article 6 par. 4 ACTA. Thus, it could be argued that Article 12 of the Enforcement Directive is in conformity with ACTA, serving the objective of preventing disproportionate consequences.[50] So, actually it is not true that this option would be lost or at least called in question, if Article 8 par. 1 ACTA is enacted in this form, as the European Academics support.[51]

Damages

In Article 9 par. 1 ACTA a set of criteria is recorded specifying the amount of compensatory damages in civil judicial proceedings concerning the enforcement of IPRs, after having stated in the very first paragraph the basic principle, *i.e.* that the damages shall be "*adequate to compensate for the injury the rightholder has suffered as a result of the infringement*". The calculation of damages in civil IP cases is controversial, given the difficulty to estimate the value of the infringement. Rightholders find it challenging to prove that a decrease of their revenues is caused by the activities of the infringer.[52] ACTA encourages judges to consider "*any legitimate measure of value the rightholder submits, which may include lost profits, the value of*

[47] "*Member States shall ensure that, where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance. Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC".*

[48] Opinion of European Academics on the Anti-counterfeiting Trade Agreement, p. 2. Similar possibility exists and in Article 44 par. 1 of TRIPs Agreement.

[49] Commission Services Working Paper (Comments on the Opinion of European Academics on Anti-Counterfeiting Trade Agreement) online at http://trade.ec.europa.eu/doclib/docs/2011/april/tradoc_147853.pdf published in 27.04.2011 /accessed 01.09.2011, p. 6.

[50] Ficsor, Compatibility of the Anti-Counterfeiting Trade Agreement (ACTA) with the EU legal system, Annual Conference on European Copyright Law, 19-20 May 2011, slide 29.

[51] Opinion of European Academics on the Anti-counterfeiting Trade Agreement, p. 2.

[52] Metzger, p. 111.

the infringed goods or services measured by the market price, or the suggested retail price". Some of the above listed criteria (Article 9 par. 1 ACTA) are provided for also in Article 13 par. 1 of the Enforcement Directive, some other are not. It has been supported that *"The value of the infringed goods or services measured by the market price, or the suggested retail price"* does not reflect the economic loss suffered by the rightholder.[53] The Enforcement Directive uses damages appropriate to the actual prejudice suffered, including lost profits. The introduction of the possibility of using not only the market price but the suggested retail price as a measure of the value of the infringed good could bring more profit than the actual damage -according to the ACTA sceptics- given that the suggested retail price is higher than the actual prejudice. In practice, the effectiveness of this measurement is disputed.[54] In the case of a downloaded movie, this does not necessarily means that the downloader would consider alternatively acquiring legally the dvd. So, the presumption that ACTA carries out, *i.e.* that the infringers' profits equal the amount of the damages claimed by the rightholder, is not always correct, since on the one hand the infringers do not sell infringing products to process similar to the legal ones and on the other hand sometimes they do not even sell.[55]

But in the case that this criterion is not so successful and accurate in calculating the injury suffered by the rightholders, the judge would not take it into account due to the 'may' language of the relevant sentence listing the possible criteria in a non-exhaustive manner. The criteria listed in Article 9 of ACTA are not obligatory for the ACTA Parties.

Additionally, in ACTA the infringement committed in good faith is not regulated and damages cannot be awarded for this kind of infringement, contrary to Article 13 par. 2[56] of the Enforcement Directive, according to which the mere existence of an infringement is a sufficient justification for the rightholder to claim damages. However, also this case is not mandatory for the national legislation, since the provision gives the possibility only -and not the obligation- to the member states to provide with this authority the courts and also to the courts the chance to award such damages.

Moreover, the opponents of ACTA claim that the compensatory damages (Article 9 par. 1) and the infringer's profits (Article 9 par. 2) may be ordered cumulatively, since there is no clarity regarding the alternative application of the different possibilities of Article 9 par. 1 and 2 ACTA. In agreement to this view this cumulative application would not be in accordance with Article 13 of the Enforcement Directive and it would raise the amount of damages for copyright infringement.[57] On the contrary, the

[53] Opinion of European Academics on the Anti-Counterfeiting Trade Agreement, p. 2.
[54] Against the effectiveness see Opinion of European Academics on the Anti-Counterfeiting Trade Agreement, p. 2 and Kaminski, p. 12 and in favor see Commission Services Working Paper, p. 6-7 and Ficsor, slide 32. More specifically, Ficsor states that "*the suggestion that that what the owners of rights may have obtained in the market as a counter-value of their goods and services must not be taken into account among the factors to calculate damages is so much absurd that it is hardly necessary to state that it is completely unfounded.*"
[55] Kaminski, p. 12.
[56] "*Where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits or the payment of damages, which may be pre-established".*
[57] Opinion of European Academics on the Anti-Counterfeiting Trade Agreement, p. 2.

Commission supports that the formulation of ACTA does not mean that the amounts stipulated in the paragraphs of Article 9 are cumulative and would result to an increase the level of applicable damages. As a supportive argument to their position, they invoke the last sentence of Article 9 par. 2, which states that the infringer's profit may be presumed to be the amount of damages referred to Article 9 par. 1, which seems to exclude the cumulative application.[58] At this point it has to be mentioned that the infringer's profit is not unknown in the Enforcement Directive but it is included in the examples of the criteria that the judge should take into account, when he sets the damages (Article 13 par. 1(a) of the Enforcement Directive). This could imply also the application of cumulative criteria, which in turn could bring an increase of the amount of the damages, in the same way that this could happen in ACTA Parties, if we do accept this interpretation to the relevant ACTA provision. This possible increase of the amount of the damages would not be necessarily negative, since the aim is the damages to "*be adequate to compensate for the injury the rightholder has suffered*" (Article 9 par. 1 ACTA but also Article 45 par. 1 TRIPs) or "*to pay to the rightholder damages appropriate to the actual prejudice suffered*" (Article 13 par. 1 of the Enforcement Directive). Besides, there is always the safeguard of the proportionality principle (foreseen also in ACTA as a general principle in Article 6 par. 3) that would not allow any potential unproportionality in the case of cumulative application of criteria.[59] Finally, it has to be mentioned that in the recent Report on the Application of the Enforcement Directive, it has been stated that "*damage awards do not currently appear to effectively dissuade potential infringers from engaging in illegal activities. This is particularly so where damages awarded by the courts fail to match the level of profit made by the infringers.*"[60] This could imply that the award of damages model adopted in the Enforcement Directive is not so successful and it could be improved, maybe even with the small differences that ACTA introduces.

Consequently, after this analysis ACTA's provisions of damages seem not to be in conflict with the European *acquis communautaire*.

Other Remedies

Ac a corrective measure ACTA provides for destruction of pirated copyright goods at the rightholder's request. ACTA does not provide any choice of other corrective measures, such as recall and definitive removal from the channels of commerce, measures available in the Enforcement Directive (Article 10 par. 1).[61] More

[58] Commission Services Working Paper, p. 7 and Ficsor, slide 33.
[59] Ficsor, slide 33.
[60] Report from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, Application of Directive 2004/48/EC, COM(2010) 779 final, 22.12.2010 online at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0779:FIN:EN:PDF /accessed 01.09.2011, p. 8.
[61] *"Without prejudice to any damages due to the rightholder by reason of the infringement, and without compensation of any sort, Member States shall ensure that the competent judicial authorities may order, at the request of the applicant, that appropriate measures be taken with regard to goods that they have found to be infringing an intellectual property right and, in appropriate cases, with regard to materials and implements principally used in the creation or manufacture of those goods. Such measures shall include:*
(a) recall from the channels of commerce,
(b) definitive removal from the channels of commerce, or

specifically ACTA requires parties to give judicial authorities the authority to destroy civil infringing goods at the rightholder's request[62] and without any compensation at all "*except in exceptional circumstances*". ACTA adopts the alternative of the disposal outside the channels of commerce -parallel to the destruction- only for material and implements, the predominant use of which has been in manufacture or creation of such infringing goods without compensation and without any undue delay, possibility that exists also in the Enforcement Directive (Article 10 par. 1: " … *in appropriate cases, with regard to materials and implements principally used in the creation or manufacture of those goods."*). Still there are some concerns that although the destruction of infringing goods is envisaged by the Enforcement Directive as one of the remedies that can be invoked in addition to damages, the other two remedies (the recall and the definitive removal of the products from the channels of commerce) are not provided for. Nevertheless, nothing prevents EU empowering judicial authorities to apply other remedies, to the extent that these authorities are also empowered as to do so, as ACTA requires.[63]

Unlike the Enforcement Directive (Article 10 par. 3) and TRIPs (Article 46), ACTA does not contain clearly the requirement of the "*proportionality between the seriousness of the infringement and the remedies ordered as well as the interest of third parties*". Nonetheless, as it has been already stated, this provision appears to be reflected in the General Obligations Section (Section 1, Chapter II), in Article 6 par. 3 ACTA, where it is provided that "*in implementing the provisions of this Chapter, each Party shall take into account the need for proportionality between the seriousness of the infringement, the interests of third parties and the applicable measures, remedies and penalties"*.[64] Similar general provision is included also in the Enforcement Directive (Article 3) but still there is a specific reference to proportionality in the provision of the corrective measures.[65] Article 6 par. 3 ACTA applies to all remedies and thus it is fully applicable in the case of these remedies too. As it was disclosed by the Commission during ACTA negotiations, Parties agreed not to make additional references to the proportionality principle in other provisions of ACTA because no *a contrario interpretation* could be based whenever a specific reference was lacking.[66]

Another point to be made in relation to these other remedies is the definition of 'pirated copyright goods' which determines the extent of the application of those measures. The definition is given in Section 2, Article 5 (k) ACTA, which in conjunction with this Article could lead to the interpretation that these measures may not be linked with an actual infringement in the territory of the EU where the action (*e.g.* destruction) is sought and it would be enough that the act "*would have*

(c) destruction".
The disposal outside the channels of commerce of the civilly infringing goods is provided also for TRIPs Agreement as an alternative to their destruction (Article 46).

[62] The destruction is provided as a civil sanction, therefore the injured party must specifically claim destruction, while in criminal and administrative proceedings it may be ordered by the competent court/administrative authority *ex officio.*

[63] The Anti-Counterfeiting Trade Agreement (ACTA): An Assessment, European Parliament, p. 27.

[64] See also ACTA - Consolidated Text prepared for Public Release, April 2010 online at http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf /accessed 01.09.2011, p. 7, Article 2.3, fn. 16.

[65] Opinion of European Academics on the Anti-counterfeiting Trade Agreement, p. 3.

[66] Commission Services Working Paper, p. 8 and Ficsor, slide 36.

constituted an infringement". This wording could provide a possibility to destroy goods produced abroad when there has not been an actual infringement in the EU. And this because the definition of the 'pirated copyright goods' may create a legal fiction of an infringement in cases where no such infringement has been committed. Otherwise it would not be possible for the customs to intervene, because import as such does not does not constitute a copyright infringement. It was the intention of the Commission to correct this 'technical problem' during the last legal scrubbing of the text and the provision in question to read as the following: "*At least with respect to goods that have been found to be pirated or counterfeited, each Party shall provide …*".[67] Apparently the Commission was not able to impose this correction during the last negotiations.

Moreover, ACTA does not include the condition of TRIPs that the remedy of destruction should occur, "*unless this would be contrary to existing constitutional requirements*". Nonetheless, it can be interpreted that this could be one of the "*exceptional circumstances*" that are exempted from the provision's application, as "*exceptional circumstances*" form a kind of an exception.

Thus, there is no conflict between those measures provided for in ACTA and in EU law.

Right of Information

In the Opinion of the European Academics is also supported that the right of information provided in Article 11 ACTA includes neither the proportionality requirement available under Article 8 par. 1 of the Enforcement Directive nor effective protection against misuse of acquired information compared to Article 8 par. 3(c) of the same Directive.[68] ACTA, however, contains a preemption rule for the national legislations on the protection of the confidential information, personal data and on statutory privileges, including the attorney privilege (Article 11).[69]

Additionally, ACTA provides the right of information against the infringer or the alleged infringer but not against third parties, contrary to Article 8 of the Enforcement Directive ("*any other person who (a) was found in possession of the infringing goods on commercial scale (b) was found to be using the infringing services ob commercial scale*."). The group of persons that can be ordered to provide information goes beyond the infringer.[70] The difference between ACTA and Enforcement Directive is that the latter permits such information to be requested by third parties, such as the ISPs, only regarding activities carried out on 'commercial scale', meaning that consumers are excluded.[71] ACTA gives only the possibility in Section 5 to the authorities to order an ISP to disclose expeditiously to a rightholder information sufficient to identify a subscriber in accordance to Article 27 par. 4 ACTA. Thus, ACTA provisions are less

[67] European Commission, Note for the Attention of the Members of the Trade Policy Committee, 4.11.2010 TRADE E/PVM (2010), p. 6.
[68] Opinion of European Academics on the Anti-counterfeiting Trade Agreement, p. 5.
[69] Metzger, p. 113.
[70] Accompanying document to the Report on the application of Directive 2004/48 on the enforcement of Intellectual property rights SEC(2010) 1589 final 22.12.2010, p. 10.
[71] Accompanying document to the Report on the application of Directive 2004/48 on the enforcement of Intellectual property rights SEC(2010) 1589 final 22.12.2010, p. 10.

demanding than the EU *acquis*; the inclusion of 'alleged infringers' in Article 11 aims to cover situations where the infringer is not yet condemned but still the relevant information is needed in the context of an ongoing judicial procedure (*e.g.* in provisional measures).[72] The relevant information may include "*information regarding any person involved in any aspect of the infringement or alleged infringement and regarding the means of production or the channels of distribution of the infringing or allegedly infringing goods or services, including the identification of third persons alleged to be involved in the production and distribution of such goods or services and of their channels of distribution*".

Relevant are also the 'Privacy and Disclosure of Information' statements contained in Article 4 ACTA. These are intended to interact with and potentially limit the requirements for disclosure of information in Article 11 (but also in Article 22 ACTA). Article 4 pars. 1(b) and (c) state clearly that ACTA gives the possibility to Parties to preserve existing confidential information either for "*public interest*" or for "*legitimate commercial interests of particular enterprises"*. It leaves it though at the discretion of the Parties to define those terms and consequently to the potential political pressure exercised at bilateral level by other Parties of the Agreement. Disclosure of information is a crucial element not only for civil and criminal enforcement but as well as for the enforcement on the digital environment and for border measures.[73]

Finally, another allegation against ACTA is that the regulated right of information is compulsory, while the right of information provided in TRIPs (Article 47) optional.[74] The character of this right in the European *acquis* is though also compulsory.

Provisional measures

ACTA provides for provisional measures to prevent an infringement,[75] to prevent goods that involve the intellectual property right's infringement from entering into the channels of commerce, and to preserve relevant evidence in regard to the alleged infringement (Article 12 par. 1). Additionally, ACTA provides the possibility these provisional measures to be taken *inaudita altera parte* (Article 12 par. 2),[76] without mentioning anything though about the necessary legal safeguards for the alleged infringer, as the Enforcement Directive (Article 9 par. 4[77]) and TRIPs (Article 50 par. 4[78] and 6[79]) do, *i.e.* that the parties should be informed without delay after the

[72] Commission Services Working Paper, p. 15.
[73] The Anti-Counterfeiting Trade Agreement (ACTA): An Assessment, European Parliament, p. 51.
[74] Opinion of European Academics on the Anti-counterfeiting Trade Agreement, p. 5.
[75] In the Enforcement Directive the infringement is characterized as 'imminent' (Article 9 par. 1).
[76] An *inaudita altera parte* or *ex parte* injunction is one having been granted without the adverse party having had notice of its application, and generally an application made by one party to a proceeding in the absence of the other, Gifis, Steven Law Dictionary, 1996 Barron's, p. 184.
[77] " *... In that event, the parties shall be so informed without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable time after notification of the measures, whether those measures shall be modified, revoked or confirmed".*
[78] "*Where provisional measures have been adopted inaudita altera parte, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed".*

execution of the measures at the latest and that the defendant has the right of review, including a right to be heard, in order to be decided whether the measures will be modified, revoked or confirmed.[80] The right to be heard is not only a 'good to have' right but it is a fundamental right recognized in Article 6 European Convention on Human Rights (ECHR), in Article 47 Charter of Fundamental Rights and guaranteed by the Court of Justice of the European Union,[81] even in the case of binding for the EU international law instruments, that do not include adequate precautions.[82] It is important to "*ensure that a balance is maintained between the competing rights and obligations of the rightholder and of the defendant*".[83] Although in ACTA no such specific procedural safeguards exist at the adoption of provisional measures *inaudita altera parte,* it is provided however in Article 6 that procedures enforcing the protection of IPRs should be applied "*in such a manner as to … provide for safeguards against their abuse*" and that "*procedures adopted, maintained, or applied to implement the provisions of this chapter shall be fair and equitable, and shall provide for the rights of all participants subject to such procedures to be appropriately protected"* (Article 6 par. 2). These guarantees apply to the entire chapter II and consequently to Article 12 also. The lack of specific procedural safeguards in this case does not lead to the conclusion that this provision is inconsistent with the *acquis*, especially since nothing in ACTA challenges the procedural guarantees foreseen in the European *acquis.*[84] Besides ACTA's aim is not to regulate in every detail all the procedural details but "*Each Party shall be free to determine the appropriate method of implementing the provisions of this Agreement within its own legal system and practice*". Finally, in the very first Article of ACTA is stated that nothing in ACTA shall derogate from any obligation under existing agreements, including TRIPs. Thus, the relevant provisions of TRIPs (Article 50 par. 4 and 6) and the ones of the Enforcement Directive that implement the above mentioned provisions in the European legislative framework (Article 9 par. 4 and 9 par. 5) actually continue to apply.[85]

ACTA specifies that those provisional measures may be ordered by the judicial authorities, "*where appropriate, against also a third party over whom the relevant judicial authority exercises jurisdiction*". In the Enforcement Directive the third parties need to be involved in the infringement "*against an intermediary whose*

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[79] "*Without prejudice to paragraph 4, provisional measures taken on the basis of paragraphs 1 and 2 shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where a Member's law so permits or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is the longer*".

[80] Additionally the Enforcement Directive requires that provisional measures to be revoked if the applicant does not institute proceedings leading to a decision on the merits of the case within a reasonable period of time (Article 9 par. 5).

[81] ECJ Case C-341/04, ECR 2006-I, 3813, para. 66, *Eurofood* and ECJ Case C-89/99, ECR 2001-I, 5851, Para. 38 seq. – *Schieving-Nijsatnd.*

[82] Metzger, p. 113. ECJ, 28.03.2000, C-7/98, ECR 2000-I, 1935, para. 38 seq. *Krombach/Bamberski.*

[83] ECHR App. No. 17506/06 para. 78 seq. – *Micallef/Malta* and Opinion of European Academics on the Anti-counterfeiting Trade Agreement, p. 3.

[84] Commission Services Working Paper, p. 8.

[85] Commission Services Working Paper, p. 8 and Ficsor, slide 39.

services are being used".[86] In ACTA the only precondition is the judicial authority to exercise jurisdiction over the third party against whom the provisional measures could be ordered.

It is important also to clarify the meaning of 'prevent from occurring' within the digital environment and if it would imply that the Internet Service Providers (ISPs) (third parties) must implement technical measures to prevent their customers from committing infringements. According to the Commission[87] 'prevent from occurring' in the digital environment in Article 27 par. 1 ACTA also makes reference to "*expeditious remedies to prevent infringements*". This Article is entirely consistent with the existing EU *acquis* in the field of intellectual property rights and also e-commerce. In particular, Article 8 of Directive 2001/29, Articles 3 and 9 of the Enforcement Directive and 12 par. 3, 13 par. (2) and 14(3) of Directive on e-commerce.[88] All these Directives provide the possibility for national authorities or courts to order provisional measures, by way of injunctive relief to prevent or terminate an infringement of intellectual property rights in individual cases. An example of this situation would be a case where a court orders a website to remove advertisements promoting sales of counterfeit goods. ACTA does not introduce any requirement for technical measures in the context of Article 27 par. 1 ACTA, pursuant at least with the European Commission's opinion.[89]

Hence, the provisions that foresee provisional measures in ACTA appear to be consistent with the Enforcement Directive.

3. Border measures

There were many voices that the implementation of ACTA would limit civil liberties and would allow the control of laptops or of air passengers at borders. According to the Joint Declaration of 16 April 2010[90] there was no proposal to oblige ACTA participants to require border authorities to search travelers' baggage or their personal electronic devices for infringing materials.

An example of respecting fundamental freedoms is the *de minimis* clause in the Customs Regulation 1383/2003[91] that exempts travelers from checks, if the infringing goods are not part of large scale traffic. But finally the *de minimis* exemption was not

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[86] According to the Report on the Application of Directive 2004/48 COM(2010) 779, final, 22.12.2010, even intermediaries with no direct contractual relationship or connection with the infringer are subject to those measures provided for in the Enforcement Directive, p. 6.

[87] Answer given by Mr De Gucht on behalf of the Commission (25.11.2010) P-9028/10EN online at http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2010-9028&language=EN /accessed 01.09.2011.

[88] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services in particular electronic commerce in the Internal Market (Directive on Electronic Commerce), OJ L 178, 17.7.2000, p. 1–16.

[89] Answer given by Mr De Gucht on behalf of the Commission (25.11.2010) P-9028/10EN online at http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2010-9028&language=EN /accessed 01.09.2011.

[90] Joint Statement on Anti-Counterfeiting Trade Agreement (ACTA) (16.04.2010) online at http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146021.pdf /accessed 01.09.2011.

[91] Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights OJ L 196, 02/08/2003, p. 7

imposed as an obligation in ACTA, since ACTA leaves the opportunity to the contracting parties to opt out and recognize the right of other parties to carry out such boarder searches: "*A party may exclude from the Application of this Section small quantities of goods of a non-commercial nature contained in traveler's personal luggage*" (Article 14 par. 2 ACTA). It worth's to be mentioned also that the relevant *de minimis* clause of Regulation 1383/2003[92] refers to goods "*within the limits of the duty-free allowance*" and it is unclear whether the 'small quantities' referred to ACTA are covered or not.

Similar *de minimis* rule is included also in TRIPs (Article 60).[93] Nevertheless, although TRIPs permits parties to exclude goods sent in small consignments, ACTA provides that the parties apply border measures to "*goods of a commercial nature sent in small consignments*" (Article 14 par. 1 ACTA). Thus, ACTA emphasizes the commercial nature of the goods and not the size of the shipment and consequently urges the border authorities to apply the IP laws even to small shipments, leaving it up to the usually untrained border agent to determine whether the nature is commercial or not.[94] The *de minimis* provision seem to be on the one hand voluntary and on the other hand more restricted than in the European *acquis* and in TRIPs.

ACTA thrives to make the whole procedure easier for the rightholders in many different ways, than in the EU Regulation. In the first place, Regulation 1383/2003 requires from a rightholder lodging for an application to "*have sufficient grounds for suspecting that goods infringe an intellectual property right*" (Article 4 par. 1), while ACTA demands from the rightholder to provide adequate evidence to demonstrate *prima facie* an infringement of the intellectual property right belonging to him. Most importantly though the last sentence of Article 17 par. 1 ACTA lowers the standards for adequate evidence by providing that "*the requirement to provide sufficient information shall not unreasonably deter recourse to the procedures*". Another weapon in the quiver of the rightholders is the possibility to provide for such applications to apply to multiple shipments (Article 17 par. 2 ACTA).[95]

Despite the differences that exist with regard to border measures between the European *acquis* and ACTA, the new Agreement does not impose any changes to the Directive 1383/2003, since all the distinct regulations in ACTA are not of mandatory character, permitting the Signatories to regulate it differently.

4. Criminal enforcement

Another issue in ACTA that triggered many discussions and concerns -at least within the European Union sphere- is the criminal enforcement (Section 4-Chapter II).[96] The

[92] "*Where a traveller's personal baggage contains goods of a non-commercial nature within the limits of the duty-free allowance and there are no material indications to suggest the goods are part of commercial traffic, Member States shall consider such goods to be outside the scope of this Regulation*". Article 3 par. 2 Regulation 1383/2003.

[93] *"Members may exclude from the application of the above provisions small quantities of goods of a non-commercial nature contained in travelers' personal luggage or sent in small consignments".*

[94] Kaminski, p. 14.

[95] Kaminski, p. 16.

[96] Section 4 of ACTA is about 'Criminal Enforcement' and contains four articles with provisions on 'Criminal Offences' (Article 23), 'Penalties' (Article 24), 'Seizure, Forfeiture, and Destruction' (Article 25) and '*Ex Officio* Criminal Enforcement' (Article 26). Issues discussed during the

reason for these concerns was mainly the fact that no *acquis communautaire* exists for criminal measures.

The efforts of EU to establish common internal standards of IPRs in the past were unsuccessful: first in the Enforcement Directive[97] and then in the so called IPRED 2 Proposal for a Directive.[98] The last attempt started in 2005 and stalled for many years due to substantial differences among member states and due to problems concerning the legal basis. After the Lisbon Treaty, that entered into force in December 2009, the competence issue constitutes no longer a concern and it is shared between the Council and the European Parliament, based on Article 83 par. 2 TFEU.[99] But still, the Commission in September 2010 has silently withdrawn the IPRED 2 proposal.[100]

Back to ACTA, apart from the issue of substance, which will be later analyzed, there was also a critical competence issue, *i.e.* who and whether was competent amongst the European institutions to negotiate ACTA concerning the criminal measures. Similar cases have existed in the past and EU committed to penal enforcement rules in international agreements, such as the TRIPs Agreement (Article 61).[101]

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negotiations under this Chapter included: clarification of the scale of infringement necessary to qualify for criminal sanctions in cases if trademark counterfeiting and copyright and related rights piracy, of the scope of criminal penalties, the authority to order searches and/or seizure of goods suspected of infringing IPRs, materials and implements used in the infringement, documentary evidence and assets derived from or obtained through the infringing activity, the authority of judicial authorities to order the forfeiture and destruction of the infringing goods and of the assets derived from or obtained through the infringing activity, Luc Pierre Devigne, Pedro Valasco-Martins & Alexandra Iliopoulou, Where is ACTA taking us? Policies and Politics, in Copyright Enforcement and the Internet (ed I. Stamatoudi), Kluwer Law International 2010, p. 37

[97] The criminal enforcement section was finally omitted from the Enforcement Directive in order to meet the deadline (May 1, 2004) of the Fifth Enlargement of the European Union.

[98] Proposal for a European Parliament and Council Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights COM/2005/0276 final – COD 2005/127 */ online at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005PC0276(01):EN:NOT /accessed 01.09.2011.

[99] *"If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76".*

[100] Withdrawal of obsolete commission proposals 2005/0127/COD(2), OJ C 252, p. 9, 18.9.2010

[101] Answer given by De Gucht on behalf of the Commission 7.12.2010, E-8295/2010 online at http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2010-8295&language=EN /accessed 01.09.2011and Commission Services Working Paper, Comments on the "Opinion of European Academics on Anti-Counterfeiting Trade Agreement", 27.04.2011 online at http://trade.ec.europa.eu/doclib/docs/2011/april/tradoc_147853.pdf /accessed 01.09.2011, p. 11. The only difference is that ACTA goes beyond Article 61 of TRIPS by introducing additional definitions or interpretations of existing TRIPs obligations, by strengthening existing obligations, by removing existing flexibilities and by introducing new obligations for criminal enforcement (see analytically Henning Grosse Ruse –Khan, From TRIPs to ACTA: Towards a new 'Gold standard' in criminal IP enforcement?, Max Planck Institute for IP, Competition & Tax Law Research Paper Series, No. 10-06, p. 12-13). The European Academics on the other hand claim that ACTA is by nature outside the EU law and would require additional legislation on the EU level, Opinion of European Academics on the Anti-counterfeiting Trade Agreement, p. 4.

The European Community did not sign TRIPs criminal measures, because it was not competent. In its Opinion 1/94 of 15 November 1994[102] the European Court of Justice[103] developed further its ERTA[104] doctrine by pointing out that the Community's exclusive external competence does not automatically flow from its power to lay down rules at internal level and that only in so far as common rules have been established at internal level does the external competence of the Community become exclusive. Thus, the Opinion concluded that "*as regards intellectual property, the harmonization achieved within the Community in certain areas covered by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) is either partial or non-existent. With regard to the measures to be adopted to secure the effective protection of intellectual property rights, the Community is certainly competent to harmonize national rules on those matters pursuant to Article 100 of the Treaty, but the Community institutions have hitherto scarcely exercised their powers in that field. It follows that the Community and its Member States are jointly competent to conclude TRIPs."*[105] The Opinion did not refer to criminal measures but it has maintained the competence of the member states in sensitive areas for which no Community legislation had been adopted. As to the substance, the content of the Opinion supports 'mixity of competences'.[106]

Similar approach was adopted also during the ACTA negotiations and for this reason was unnecessary to ask also in this case an opinion on ACTA from the Court of Justice of European Union, since probably the conclusion of the Court of Justice would not differ substantially from the WTO Opinion. In April 2008 the Council authorised the Commission to negotiate ACTA, pursuant to the Article 207 TFEU[107] (then Article 133 of the EC Treaty) and agreed that the rotating Presidency of the EU, on behalf of the member states, would fully participate in the negotiations -in co-ordination with the Commission- on matters falling within member states competence. Such matters included the type and level of criminal penalties to be

[102] Opinion of the Court of 15 November 1994. - Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty. - Opinion 1/94. European Court reports 1994 Page I-05267 online at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61994V0001:EN:HTML /accessed 01.09.2011. See also relevant analysis at Meinhard Hilf, The ECJ's Opinion 1/94 on the WTO – No Surprise, but Wise?, 6 EJIL (1995) 1-259.

[103] The questions put to the ECJ by the Commission in its request for an Opinion seek to ascertain, first, whether or not the Community has exclusive competence to conclude the Multilateral Agreements on Trade in Goods. Those questions further relate to the exclusive competence the Community may enjoy, to conclude the Agreement on Trade-Related Aspects of Intellectual Property Rights, including trade in counterfeit goods.

[104] The creation of the doctrine is found in the *ERTA* case ECJ, Case 22/70 *Commission* v. *Council (ERTA)* [1971] *ECR* 263, para. 19. The case stated that the Community is competent to enter into international agreements with third States, but did more importantly introduced the doctrine of implicit competences, parallelism otherwise called the *ERTA-doctrine*. The case was about the Community's entry into an international agreement regulating road transports, an area in which the Community lacked expressed external powers. This did however not confine the Court, which states that the EC could have treaty-making capacity even in cases where such competences were not explicitly provided in the Treaty, Ott & Wessel, The EU's External Relations Regime: Multilevel Complexity in an Expanding Union, Working Paper Universiteit Maastricht (2005), Ch. 2.

[105] Opinion of the Court of 15 November 1994.

[106] Meinhard Hilf, The ECJ's Opinion 1/94 on the WTO – No Surprise, but Wise?, 6 EJIL (1995) 1-259, p. 13.

[107] See before Fn. 33.

applied by ACTA Parties for infringements of IPRs and dispositions on penal procedural law.[108]

The non existence of *acquis* on criminal enforcement of IPRs seem -at least at the first place- to contradict two basic arguments of the European Commission for ACTA defense: a) That there would be no infringement of the *acquis communautaire* through the adoption of ACTA and b) that ACTA is not about substantive law but about enforcement of existing law, and this is why the *acquis communautaire* will remain unchanged. At the heart of ACTA anxiety is the danger of legislation through the back door and this is the point regarding the enforcement of criminal measures.[109]

The Commission's chief negotiator in ACTA, Luc Devigne, stated in a hearing on March 22, 2010[110] that, since the issue of criminal enforcement was not harmonized through a European Directive or in a different way, legal harmonization through ACTA would not be problematic, as it would not change the *acquis*. The Commission supports also the opinion that the criminal enforcement chapter of ACTA will not replace the need for a European *acquis* harmonizing the penal aspects of IPRs infringement. If we would accept that ACTA conflicts with EU law, because there are no provisions on criminal enforcement within the EU legal enforcement, then TRIPs could face -or should have faced- the same challenge (due to Article 61) as well. In the same way that no additional legislation was needed to implement the relevant provision of TRIPs, no special legislative measures need to be taken in regard with the criminal enforcement Section in ACTA.[111]

From the substantial issues the one that gathered the most concerns in the Chapter of 'Criminal Enforcement' was the definition of 'commercial scale'. According to Article 23 par. 1 ACTA and for the purposes for the Section 4 "*acts carried out on commercial scale include at least those carried out as commercial activities for direct or indirect economic or commercial advantage*".[112] The European opponents of ACTA support[113] that this definition contradicts the definition that was given in the Proposal of IPRED 2 Directive, which expressly excluded acts "*carried out by private*

[108] Answers given by De Gucht on behalf of the Commission 30.11.2010, P-9029/10EN online at http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2010-9029&language=EN, 7.12.2010, E-8295/2010, online at http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2010-8295&language=EN and 15.03.2010, E-0217/2010, online at http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2010-0217&language=EN /all accessed 01.09.2011.

[109] Lassi Jyrkkiö, Smooth Criminal Harmonisation: ACTA, EU and IPR Enforcement, IP-Watch 8-4-2010 online at http://www.ip-watch.org/weblog/2010/04/08/smooth-criminal-harmonisation-acta-eu-and-ipr-enforcement/ /accessed 01.09.2011.

[110] See details at http://trade.ec.europa.eu/doclib/press/index.cfm?id=517 /accessed 01.09.2011.

[111] Commission Services Working Paper, p. 11.

[112] The final text of ACTA has abandoned the previous formulation of this Article, in which 'commercial scale' was defined as including "*a) significant willful copyright or related rights infringements that have no direct or indirect motivation of financial gain and b) willful copyright or related rights infringement for purposes of commercial advantage of financial gain*". Consolidated text prepared for Public Release, ACTA April 2010 online at http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf /accessed 01.09.2011. The omission of the 'significant' infringement lead probably to the expression of the present version of ACTA that acts carried out on commercial scale include '*at least*' those ones carried out as commercial activities for direct or indirect economic or commercial advantage.

[113] Opinion of European Academics on the Anti-counterfeiting Trade Agreement, p. 4.

users for personal and not-for-profit purposes".[114] This Proposal for a Directive, however, never came official to life and it has been recently abandoned. Thus, it has not been adopted and it does not belong to the EU *acquis,* as correctly indicates the Commission Services Working Paper (Comments on the Opinion of European Academics on Anti-Counterfeiting Trade Agreement).[115] On the other hand the Commission has repeatedly stated that they took as basis for the negotiations the Study made for the Proposal for a Directive on criminal enforcement of IPRS (COM 2006/168 final).[116] Surprisingly -or not- nothing is mentioned in this Study concerning the above quoted exclusion from the scope of the Directive of acts "*carried out by private users for personal and not-for-profit purposes*" but only Article 61 TRIPs is referred. The wording of Article 23 par. 1 ACTA is compatible with Article 61 TRIPs[117] because it provides that acts carries out on commercial scale include **at least** those carried out as commercial activities for direct or indirect economic or commercial advantages. The acts of commercial scale are not equal to acts committed for commercial purposes. Moreover, the interpretation by the WTO Panel confirms that the acts committed on a 'commercial scale' include also acts committed without commercial purposes but which -due to their magnitude or extent- reach the level of 'commercial scale'.[118]

It has been supported that the qualification of 'commercial scale' has been reduced by ACTA to a mere qualitative element requiring a purpose of an economic or commercial advantage[119] and this contradicts the approach adopted by a WTO Dispute Panel has been regarding Article 61 TRIPS, demanding both a qualitative and a quantitative element in order the notion of commercial gain to be established.[120] The definition in ACTA emphasizes more the qualitative element but it does not necessarily disqualify the quantitative character, since the phrase 'at least' pushes back this interpretation.

'Commercial scale' is a prerequisite for criminal liability and the visible concern for the definition of 'commercial scale' is that covers many activities that most people would not think that are of commercial nature. How does this prerequisite of 'commercial scale' apply to online infringement? The indirect economic advantage could cause major troubles, since it criminalizes a wide range of acts, other than the direct sales of infringing goods. It could be so interpreted, that it includes benefits as

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[114] Position of the European Parliament adopted at first reading on 25.4.2007 with a view to the adoption of Directive on the harmonization of criminal measures aimed at ensuring the enforcement of intellectual property rights.

[115] Commission Services Working Paper (Comments on the Opinion of European Academics on Anti-Counterfeiting Trade Agreement) online at http://trade.ec.europa.eu/doclib/docs/2011/april/tradoc_147853.pdf published in 27.04.2011 /accessed 01.09.2011, p. 12.

[116] Answers given by De Gucht on behalf of the Commission 09.03.2010, O-0026/10EN online at http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20100309&secondRef=ITEM-015&language=EN /accessed 01.09.2011 and on 27.09.2010, E-4292/10EN online at http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2010-4292&language=EN /accessed 01.09.2011.

[117] The non-derogation provision of Article 1 par. 1 of ACTA should be also kept in mind.

[118] WTO Dispute Settlement Understanding (DSU) USA against China (WT/DS362/R, 09/O240, 26.01.2009) (China-IPRs) and Ficsor, slide 59.

[119] Henning Grosse Ruse-Khan, p. 14.

[120] WTO Dispute Settlement Understanding (DSU) USA against China (WT/DS362/R, 09/O240, 26.01.2009) (China-IPRs) regarding *inter alia* Article 61 TRIPs (WTO, 2009) at 7.544-7.552, 7.577.

advertising revenues or even the prevention of expenditures or even shipping infringing goods, receiving in this way an indirect economic advantage.[121] Widespread file sharing between individuals could be interpreted as 'commercial scale' especially after the omission of an EU-like expression that would exclude expressly any acts carried out by end consumers acting in good faith. Generally, it could be argued that the concepts used to define commercial scale are relatively unclear and they do not provide for an appropriate and sufficiently precise definition of the element of a crime under the current laws in the EU. The definition though is based on the commercial activity which will be interpreted and implemented by the domestic legislation and the jurisprudence of the Parties.[122]

It is also important to mention that in the EU *acquis* already exists a definition of 'commercial scale' not in the context of criminal measures but in the Enforcement Directive. According to Preamble (Recital 14) "*Acts carried out on a commercial scale are those carried out for direct or indirect economic or commercial advantage…*" and this definition presents quite a resemblance with the one in ACTA. The definition in the Preamble of the Enforcement Directive, however, continues clarifying that "*this would normally exclude acts carried out by end consumers acting in good faith*".[123] This clarification is absent from ACTA and although this could be detrimental for the consumers, since the borderline between commercial and non-commercial use is often very difficult to be distinguished, it does not lead to the conclusion that the EU does not have the possibility to add this in any future definition of 'commercial scale' with regard to criminal enforcement measures.

Apart from that, it has been also claimed that ACTA does not affirm safeguards for private users and for limitations and exceptions, because there is no provision regulating that any act that would qualify as an exception would not constitute a criminal offence (similar provision was included in the Proposal for the IPRED 2 Directive by the European Parliament).[124] Nevertheless, the legitimate exceptions stay out of the spectrum of criminal enforcement of ACTA, which applies only to willful illegal activities (such as piracy and counterfeiting) practiced on a 'commercial scale'.[125]

Finally, in regard to the safeguards for ensuring the balance of interested parties, the opponents of ACTA claim that are not provided for in the text, and the same applies to the infringer's right to be heard in the procedures of seizure, forfeiture and destruction.[126] We have to keep in mind though, that on the one hand the general provision on safeguards and procedural guaranties in Article 6 par. 2 ACTA applies also to the Chapter of criminal enforcement and that on the other hand ACTA will not repeal the safeguards already foreseen in the national legislation of the Parties or the European Union legislative framework.[127]

Camcording

[121] Kamiski, p. 18.
[122] Commission Services Working Paper, p. 18.
[123] Commission Services Working Paper, p. 12.
[124] Opinion of European Academics on the Anti-counterfeiting Trade Agreement, p. 4.
[125] Commission Services Working Paper, p. 12.
[126] Opinion of European Academics on the Anti-counterfeiting Trade Agreement, p. 4.
[127] Commission Services Working Paper, p. 13.

ACTA additionally criminalizes unauthorized filming movies in movie theaters (the so called camcording) (Article 23 par. 3 ACTA). The inclusion of this undertaking within the acts that a Party may provide criminal procedures is due probably to the USA, that has enacted already in 2003 the U.S. Camcorder ACT.[128] No specific anti-camcord legislation exists in the European Union but for Italy and Spain, yet there is coverage under other relevant laws.[129] Although the criminalization of the act of "*unauthorized copying of cinematographic works from a performance in a motion picture exhibition facility generally open to the public*" seem to be possible without the 'commercial scale' assessment and without any assessment of the intention of the infringer, it is positive that it is merely optional for the Parties of ACTA. This is also why this provision does not conflict with the European *acquis*. Moreover according to the European Commission the copyright exceptions are not covered by ACTA and thus, the private copy exceptions still apply.[130]

It has been argued that although the optional character of camcording's criminalization was a positive development, it is not equally encouraging the fact that judges in ACTA countries could still order seizure, forfeiture, and destruction of DVDs containing camcorded movies, or equipment used in camcording (Article 25).[131] This position is not correct, because Article 25 ACTA provides that "*With respect to the offences specified in paragraphs 1,2,3, and 4 of Article 23 (Criminal Offences) for a which a Party provides criminal procedures and penalties …*" making it clear that the Party has the possibility to provide the competent authorities to have the authority to order the seizure, the forfeiture and the destruction of the pirated copyright goods, only regarding acts for which criminal offences are provided. Since the criminalization of camcording is optional, in the case where no criminal offence is provided, no seizure, destruction or forfeiture can be imposed.

5. Safeguards

One of the alleged disadvantages of ACTA is the fewer safeguards that it includes, having eliminated safeguards available under TRIPs.[132] Without analyzing the concrete provisions, it has to be underlined in this regard that ACTA already in the Preamble states that its purpose is complementary to TRIPs (Preamble par. 4) and the first Article assures that its provisions are compatible with existing agreements, including TRIPs. Thus, all the mandatory safeguards provided for in TRIPS are in no way modified by ACTA, without being necessary to be mentioned and repeated specifically in the text of ACTA. EU member states must still comply with TRIPs and its safeguards.

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[128] The Family and Entertainment Act of 2003, 18 U.S.C. § 2391B (2010) Unauthorized recording of motion pictures in a motion picture exhibition facility.

[129] Anti-Camcord Legislation (ACL) Chart online at http://www.natoonline.org/pdfs/PDF%20Movie%20Theft/International%20Camcord%20Statutes.pdf /accessed 01.09.2011.

[130] Commission Services Working Paper, p. 13.

[131] Rashmi Rangnath, USTR releases finalized ACTA text: Concerns remain online at http://www.publicknowledge.org/blog/ustr-releases-finalized-acta-text-concerns-re /accessed 01.09.2011.

[132] Opinion of European Academics on the Anti-counterfeiting Trade Agreement, p. 5.

Besides, the more general safeguards in TRIPs contained in Articles 7 and 8 are incorporated in ACTA through Article 2 par. 3. Article 7 of TRIPs secures that the enforcement of IPRs "*should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations".* Article 8 par. 2 TRIPs[133] allows parties to provide measures to prevent the abuse of IPRs.

Also it should not be overlooked that other safeguards exist also in the Preamble of ACTA, *i.e.* par. 5 expresses the goal that enforcement should not be implemented in a way that poses greater barriers to trade and par. 6 states that the problem of infringement of IPRs is desired to be addressed "*in a manner that balances the rights and interests of the relevant rightholders, service providers, and users"*.

Of particular importance are also the 'Privacy and Disclosure of Information' statements contained in Article 4 ACTA, already mentioned before. And finally there is always Article 6 in the General Obligations, which provides a strong basis on which stakeholders can demand balanced implementation. Article 6 par. 2 of ACTA provides that procedures should be fair and that the rights of all participants should be protected. Those provisions are mandatory, which means that they must be given as much attention as other provisions of ACTA and that they are operative.[134]

6. Enforcement of Intellectual Property rights in the Digital Environment (Section 5)

The most controversial chapter in ACTA and the one that triggered the most conversations within the academic and business fields is Section 5, the Enforcement of Intellectual Property Rights in the Digital Environment. For the ones that did not follow closely the ACTA negotiations would be useful to notice that the version of this Section finally adopted presents many differences than the previous ones. We will not analyze thoroughly the previous versions of this Section and the relevant provisions, since this would exceed the needs of this paper. The basic provisions though will be mentioned and we will examine the meaning of the changes ultimately adopted regarding the enforcement in the digital environment and most importantly what is the role that the ISPs are called to play. Additionally the issue of technological measures is also considered.

Much of the controversy has focused on the possibility that ACTA would require from the Parties to enforce a graduated response system or also known as a 'three strikes system', in which ISPs are required to terminate internet access to their subscribers in the case of repeated copyright infringement. A few countries, amongst them also some European ones, such as France and UK, have already adopted or they are about to adopt graduate response mechanisms in their national legislations.

The non-adopted provision

[133] "*Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by rightholders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology".*
[134] The Anti-Counterfeiting Trade Agreement (ACTA): An assessment, European Parliament, p. 51.

In the non-adopted version of the enforcement in the digital environment section ISPs could enjoy an immunity, so long as they had no direct responsibility for the infringement. This provision did not present any difference to the European *acquis* and specially to Directive on e-commerce. Nevertheless, there was a catch; the ISP safe harbors provisions presupposed that the ISPs should have adopted and reasonably implemented "*a policy to address the unauthorized storage or transmission of materials protected by copyright*". In order the meaning of this wording to be crystal clear a footnote was clarifying that an example of such policy could be "*providing for the termination in appropriate circumstances of subscriptions and/or accounts in the service provider's system or network of repeat infringers*",[135] a sic expression to describe the three strikes approach. A second condition in order an ISP to enjoy immunity was the existence of a 'takedown' procedure, although no specific mechanism was definitely decided and a number of options mirrored the undecisiveness of the Parties.[136] Generally, it could be said that many of the provisions of the older versions of this section of ACTA presented a definitive resemblance to DMCA and they were interpreted as an attempt to export the DMCA provisions to the international legal framework. On the one hand, however, the disagreements of many parties on the internet provisions and specifically the ISP liability and on the other hand the desire of USA to conclude the Agreement before the end of 2011, were probably the major reasons that the three strikes rule was finally dropped from ACTA and the so called 'ACTA Ultra-Lite' version was created and adopted.[137] Out of the text were liability exemptions and conditions to make ISPs eligible for such exceptions. The enforcement in the digital environment Section was diminished from five to three pages and the result was more protective to substantive rights, liabilities and exceptions.[138]

The finally adopted Section 5

In the final text of ACTA any reference to graduated response has been omitted. Nonetheless, Footnote 13 offers the possibility to the Parties to preserve or even to adopt any existing system providing for ISP liability limitation.[139] In the final version of ACTA there is only one provision in this regard, that provides for the following in Article 27 par. 3: **"***Each Party shall endeavour to promote cooperative efforts within the business community to effectively address trademark and copyright or related rights infringement while preserving legitimate competition and, consistent with that*

[135] See similar provision in the US Copyright law, Section 512(i) of the Digital Millennium Act (DMCA) "*Conditions for Eligibility.— **(1)** Accommodation of technology.— The limitations on liability established by this section shall apply to a service provider only if the service provider— **(A)** has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers; …*". This footnote was included in the Draft of January 18, 2010 (Informal Predecisional/Deliberative Draft), p. 28 n. 29 but was eliminated in the April Draft of ACTA.

[136] ACTA Consolidated Text, April 2010, p. 21.

[137] As the last version was named by Mr Hammerstein from the Trans-Atlantic Consumer Dialogue, Ermert, Treaty Negotiations turn to "ACTA-Lite" in hopes of Closure, IP Watch (8.9.2010) online at http://www.ip-watch.org/weblog/2010/09/08/treaty-negotiators-turn-to-%E2%80%9Cacta-lite%E2%80%9D-in-hopes-of-closure/ /accessed 01.09.2011.

[138] See analytically for the relevant provisions in the oldest version of ACTA at Bridy, ACTA and the Specter of Graduate Response, American University International Law Review, Vol. 26, No. 3, pp. 558-577, Spring 2011 PIJIP Research Paper No. 2, p. 3ff.

[139] The Anti-Counterfeiting Trade Agreement (ACTA): An assessment, European Parliament, p. 57.

Party's law, preserving fundamental principles such as freedom of expression, fair process, and privacy." The wording 'shall endeavour' has replaced the 'shall' and the provision having only apparently a mandatory character does not impose any obligation to bring results and could not be interpreted as mandating ACTA Signatories to introduce 'three strike' or similar systems. Apart from this provision a new relevant statement made its entry in the Preamble (par. 7) according to which the Parties to ACTA desire "… *to promote cooperation between service providers and rightholders to address relevant infringements in the digital environment.*"

After the strong resistance and pressure from both within and outside the negotiation procedure the Parties (and most importantly the USA who urged for an IP maximalism and pushed for stricter provisions) have compromised and abandoned the provisions regulating intermediary liability provisions. It seems that the aspirations of IP maximalists have been disappointed but this statement is not exactly true. The current provision does not constitute an obligation anymore to the Signatories of the Agreement and to the others that will entry in a later point but definitely it gives the means to the 'strong' and powerful Parties to press for such a voluntary cooperation between service providers and rightholders. A mandatory provision obliging the governments to establish a three strike systems to the ISPs was expected to -and did- cause major reactions to the consumers, the ISPs and generally the public at large. On the contrary the change to a voluntary language had a calming down effect and on the same time supplied the means to push for the 'voluntary cooperation'. In any case this wording resonates strongly the industry demands that ISPs should take a more active role in antipiracy efforts in the digital environment. The strategy of the entertainment industry was either to establish the graduated response systems through legal instruments in the national legislation or, when this was not possible, to seek government pressure for graduated response or the three strike system.[140] ACTA seem to follow the recent trend away from a passive-reactive approach (requiring from carriers and hosts to behave passively until becoming aware of copyright-infringing activities on their networks) toward an active-preventative approach instead. Government policies, voluntary practices, legislative enactments, and judicial rulings are all contributing to this shift in the rules applicable to online intermediaries.[141]

The principle of cooperation between concerned parties and the seeking of voluntary solutions is not unknown in the European *acquis* and it is already foreseen in Articles 15 par. 2, 16 (Codes of Conduct) and 19 (Cooperation) of the Directive on e-commerce as well as in Article 17 of the Enforcement Directive.[142]

Additionally 27 par. 4 ACTA provides the possibility (prescribes no obligation to the Parties) to give the relevant authorities "*the authority to order an online service provider to disclose expeditiously to a rightholder information sufficient to identify a*

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[140] Bridy, at 10.

[141] DeBeer Jeremy F. & Clemmer Christopher D. Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries? *online* at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1529722 /accessed 01.09.2011.

[142] ACTA Debate European Parliament, 20.10.2010 online at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20101020+ITEM-016+DOC+XML+V0//EN /accessed 01.09.2011 and answer given by De Gucht on behalf of the Commission 22.12.2010, P-9026/10EN online at http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2010-9026&language=EN /accessed 01.09.2011.

subscriber whose account was allegedly used for infringement, where that rightholder has filed a legally sufficient claim of… copyright or related rights infringement, and where such information is being sought for the purpose of protecting or enforcing those rights These procedures shall be implemented in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and, consistent with that Party's law, preserves fundamental principles such as freedom of expression, fair process, and privacy."[143]

The measures aimed at requiring ISPs and other intermediaries to provide information about subscribers to rightholders on request are not mandatory. The provisions mandating the application of normal procedures for injunctions and provisional measures are also applied in the enforcement in digital environment due to Article 27 par. 1.

Article 27 par. 4 ACTA corresponds to existing EU legislation, in particular Article 8 of the Enforcement Directive, that provides that ISPs may be ordered by competent judicial authorities to provide personal information, that they hold about alleged infringers (*e.g.* information regarding the origin of distribution networks of the goods or the services which infringe an intellectual property right) in response to a justified and proportionate request in cases of infringement on a commercial scale (see also the relevant Recital 14 of the Enforcement Directive). Thus, the 'commercial scale' is a decisive factor to determine the limits of the monitoring and to set the boundaries of respecting proportionality.[144] Similarly Article 15 par. 2 of Directive on e-commerce provides that "*Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements*".

As already stated before, the provision of Article 27 par. 4 ACTA lays down a number of safeguards that "*These procedures shall be implemented in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and, consistent with that Party's law, preserves fundamental principles such as freedom of expression, fair process, and privacy.*" Thus, any implementation of this ACTA provision is subject also to the EU fundamental rights, namely the freedom of expression, fair process and privacy. It is reasonable that it cannot be expected from an international instrument to be as detailed as the national laws or even the European Directives. An international agreement, such as ACTA, is expected to give the general

[143] The ACTA provision on the disclosure of subscribers' data (Article 27.4) is not mandatory and it cannot be compared with the different nature of Article 47 of TRIPs *"Members may provide that the judicial authorities shall have the authority, unless this would be out of proportion to the seriousness of the infringement, to order the infringer to inform the rightholder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution".* The scope of the provision is mostly to detect the business structures. Vander, in Busche/Stoll, TRIPs, 2007, Article 47 Rdn 3. In any case when TRIPS was negotiated in early 90's ISPs were not unknown but definitely were not taken into account by the drafting of the provision, Commission Services Working Paper, p. 19.

[144] Opinion of European Data Protection Supervisor on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA), OJ 5.6.2010, C 147, p. 1.

guidance and the key principles, which will be further elaborated by the national legislations.[145]

Another clause that safeguards the role of service providers and respects the rule of law is that rightholder must file "*a sufficient claim*" to disclose the information required. However, there is much room for legal interpretation on what constitutes a sufficient claim of infringement.

Also the general safeguards foreseen in ACTA should not be overlooked. Even in the Footnote 13, which envisions the possibility for the Parties to maintain or to adopt limitations on the liability of ISPSs, the need for preservation of the legitimate interests of the rightholders is emphasized.

As far as it concerns which authority is competent to order the disclosure of the information, both the EU legislation (Article 15 par. 2 of the Directive on e-Commerce) and ACTA refer to the competent (public) authorities, which will have to be determined according to Parties' legislations. In the EU context and depending on the legal framework of each member state, these will be either judicial or administrative authorities. For instance, in the case of civil proceedings, Article 8 par. 1 of the Enforcement Directive clearly allocates this power to the competent judicial authorities.[146]

Within the EU it is also worth recalling the Amendment 138 to the Framework Directive[147] in the context of Review of Telecoms Package.[148] Most of the scope of the Telecoms Reform Package is of limited -or no- relevance here. Only Proposal 138 for the Better Regulation Directive is interesting for our topic and was the one most widely debated in media, in the EU Parliament and the Council. The final and compromised version of the Amendment replaced the requirement for a "*prior ruling by the judicial authorities*" with the requirement for a "*prior fair and impartial procedure*" in order measures to be taken regarding end-users access to electronic communications networks. In this provision (Article 1 par. 3a)[149] it is laid down that

[145] Commission Services Working Paper, p. 19.

[146] Answer given by Mr De Gucht on behalf of the Commission at parliamentary question P-9459/10EN (10.1.2011).

[147] Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 OJ L 337, 18.12.2009, p. 37.

[148] The Telecoms Reform Package was presented to the European Parliament on November 13, 2007, voted upon May 6, 2009 and finalized on November 25, 2009. It comprises of five Directives (the Framework Directive, the Access Directive, the Authorization Directive, the Universal Service Directive and the E-privacy Directive).

[149] Article 1 par. 3a of Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002. "*Measures taken by Member States regarding end-users access' to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law. Any of these measures regarding end-users' access to, or use of, services and applications through electronic communications networks liable to restrict those fundamental rights or freedoms may only be imposed if they are appropriate, proportionate and necessary within a democratic society, and their implementation shall be subject to adequate procedural safeguards in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with general principles of Community law, including effective judicial protection and due process. Accordingly, these measures may only be taken with due respect for the principle of the presumption of innocence and the right to privacy. A prior, fair and*

any restriction to fundamental rights or freedoms may only be imposed if the measures are appropriate, proportionate and necessary within the democratic society and their implementation should be subject to adequate procedural safeguards in conformity with the ECHR and with general principles of EU Law including effective judicial protection and due process.

Thus, there is no conflict between ACTA and EU law in this Section. ACTA demands respect for the fundamental principles (as it is also dictated in the European directives) and each Party has to implement those principles in a more detailed manner in the national legislation.[150]

TPMs

The anti-circumvention rules of ACTA have also significantly changed from the initial versions of the draft texts. In the final text of ACTA there are some additional requirements.

In order to provide the adequate legal protection and effective legal remedies referred to in Article 27 par. 5 , each Party shall provide protection at least against:
"*(a) to the extent provided by its law: (i) the unauthorized circumvention of an effective technological measure carried out knowingly or with reasonable grounds to know; and*
(ii) the offering to the public by marketing of a device or product, including computer programs, or a service, as a means of circumventing an effective technological measure; and:
(i) the unauthorized circumvention of an effective technological measure carried out knowingly or with reasonable grounds to know; and
(ii) the offering to the public by marketing of a device or product, including computer programs, or a service, as a means of circumventing an effective technological measure;"

The crucial point is the phrase "*to the extent provided by its law*" which makes the requirements optional and it presupposes that they exist in a Party's national legislation. In the case they are not found in the national law, it is not obligatory to implement these requirements.

Additionally another requirement that ACTA sets is that the technological protection measures (TPMs) are used by authors, performers or producers of phonograms in connection with the exercise of their rights, meaning that TPMs used by another group, such as broadcasters to control access to scheduled programmes are not protected, or TPMs used by a group of beneficiaries to achieve goals not linked to protecting their copyright (access control) are not protected either.[151] The provision in the European *acquis* is more general and it does not have a language restricting the

impartial procedure shall be guaranteed, including the right to be heard of the person or persons concerned, subject to the need for appropriate conditions and procedural arrangements in duly substantiated cases of urgency in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to effective and timely judicial review shall be guaranteed."

[150] Ficsor, slide 63.

[151] European Commission, Note for the Attention of the Members of the Trade Policy Committee, 4.11.2010 TRADE E/PVM (2010), p. 7.

protected TPMs to the ones used by authors, performers or producers but applies to all rightholders of any copyright or any right related to copyright as provided for by law or even the *sui generis* right provided for in Directive 96/9/EC (Article 6 par. 3 of the Information Society Directive 2001/29).

Regarding circumvention of TPMs ACTA (Articles 27 pars. 5 and 6) has brought changes to the relevant international instruments regulating this topic, *i.e.* WCT and WPPT.[152] WCT requires Parties to "*provide adequate legal protection ... against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights ... and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law*"[153] Despite the resemblance between ACTA provisions (Article 27 par. 5) and WCT, ACTA additionally gives a definition of technological measures in Footnote 14[154] broadening international law specifying that the technological measures are deemed as 'effective' when works are controlled "*through the application of a relevant access control or protection process, such as encryption or scrambling, or a copy control mechanism, which achieves the objective of protection"*.[155] Although ACTA elaborates more the ways in which such protections should be extended, this does not constitute a problem for EU, since they remain within the framework of Article 6 of the Information Society Directive, which implements Articles 11 WCT and 18 WPPT.[156]

Article 27 pars. 5 and 6 of ACTA seem to be in accordance with Article 6 of the Information Society Directive 2001/29.[157] Article 6 par. 2 of Information Society Directive prohibits a wide range of preparatory activities. As it has been supported,[158] Article 6 of the Information Society Directive is based on a correct interpretation of the relevant provisions of the WCT and the WPPT. Without the prohibition of the preparatory acts the provisions of the Directive could not fulfill the obligation to provide adequate protection and effective remedies against circumvention of technological protection measures. It would also refuse protection to certain TPMs, which would be in conflict with the provisions of the Treaties requiring protection for

[152] To some extent anti-circumvention provisions are found in Articles 2, 3 and 6 of the Council of Europe Convention on Cybercrime online at http://conventions.coe.int/Treaty/EN/Treaties/html/185.htm /accessed 01.09.2011.
[153] Article 11 WCT. See also Article 18 WPPT.
[154] *For the purposes of this Article, technological measures means any technology, device, or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works, performances, or phonograms, which are not authorized by authors, performers or producers of phonograms, as provided for by a Party's law. Without prejudice to the scope of copyright or related rights contained in a Party's law, technological measures shall be deemed effective where the use of protected works, performances, or phonograms is controlled by authors, performers or producers of phonograms through the application of a relevant access control or protection process, such as encryption or scrambling, or a copy control mechanism, which achieves the objective of protection.*
[155] Kaminski, p. 22.
[156] Report on the application of the Directive on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC), 30.11.2007, SEC(2007) 1556 online at http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/application-report_en.pdf /accessed 01.09.2011, p. 6.
[157] In EU legislative framework anti-circumvention provisions can be found also in two more Directives; in Article 7 par. 1(c) of the Computer Programs Directive and in Article 4 of the Conditional Access Directive.
[158] Ficsor, slides 61 and 62

any TPMs (both access-control and rights control).[159] Some argue that ACTA goes beyond the relevant provisions of the WCT and the WPPT[160] but it cannot be supported that goes substantially beyond the relevant provision of the Information Society Directive, since the latter prohibits also preparatory acts.

Another point that raised concerns is the lack of a mechanism to ensure the exercise and enforcement of exceptions and limitations.[161] Nevertheless, ACTA in Article 8 gives the possibility to a Party to "*adopt or maintain appropriate limitations or exceptions*" to measures implementing the prohibition of circumvention of TPMs and the protection of electronic management information. At the same time ACTA preserves the *status quo* of the rights, limitations and exceptions or defenses to copyright or related rights infringement existing in the law of a Party. This general approach is due to the different national legislations, since not all ACTA parties have ratified WIPO Internet Treaties.[162] So, actually concerning TPMs ACTA (Article 27 par. 8) preserves the right of the Parties not only to maintain any possible existing exceptions and limitations but also to adopt new ones, if they consider it necessary. Accordingly, the European *acquis* is maintained but questionable is if the crafting of new exceptions and limitations is allowed.[163]

This means that any anti-circumvention protection can be subject to any existing exceptions and there is no limitation on the scope of exception to TPMs.[164]This general approach to limitations and exceptions gives also the possibility to apply the relevant exceptions for computer programs (Directive 91/250).[165]

Regarding interoperability and technical provision Footnote 15 solves any misconception stating that there is no obligation to amend the current legal framework, since there is no obligation for a Party to mandate interoperability and more specifically there is no obligation to ICT industry to design devices, products, components or services to correspond to certain technological measures. In this way the limitations expressed in Directive 2001/29 (Recital 48-second sentence) and in Directive 91/250 are maintained. To this aim a Negotiator's Note has been added for clarification at the request of EU.

III. Conclusion

In the conclusion we are supposed to give an answer to the question posed in the title of the paper. Is there finally a love or a hate relationship between ACTA and copyright in the EU? Or to put it in other words is ACTA compatible with the

[159] Ficsor, slide 62.
[160] Opinion of European Academics on the Anti-counterfeiting Trade Agreement, p. 6.
[161] Opinion of European Academics on the Anti-counterfeiting Trade Agreement, p. 6.
[162] Commission Services Working Paper, p. 18-19.
[163] The Anti-Counterfeiting Trade Agreement (ACTA): An assessment, European Parliament – Directorate-General for External Policies/Policy Department, p. 57.
[164] In earlier drafts it was included that the limitations were permitted "*so long as they do not significantly impair the adequacy of legal protection of technological measures or electronic rights management information or the effectiveness of legal remedies for violations of those measures*", ACTA - Consolidated Text prepared for Public Release, April 2010, Article 2.18 (7) (6.2), p. 24.
[165] It is the only section in ACTA where limitations and exceptions are explicitly mentioned.

European *acquis communataire* concerning copyright? The question is not only of academic value but also of a high practical importance. The ratification of the Treaty could depend on the answer given -not of course by the author of this paper but- by the European institutions and more importantly by the members of the European Parliament.

The fact that ACTA falls under Article 207 TFEU[166] means that the standard rules on ratification apply. The Commission will need to formally decide whether to propose the agreement for ratification and the Council will need to decide whether to sign and conclude the Agreement. Already on August 23, 2001 the EU Council has published Document 12192/11[167] conveying a draft Decision saying that the President of the Council shall be authorised to designate the person(s) empowered to sign the Agreement on behalf of the Union. To the extent that the agreement is mixed, *i.e.* it concerns both EU and Member States' competences, it will require ratification also by the Member States.[168] Finally, the Parliament will be required to give its consent. If ACTA requires changes in the EU *acquis*, this may incline a number of European Parliamentarians to vote against the ratification of the Treaty as it stands.

The final text does not seem to fulfill its initial aims to robust cooperation mechanisms among ACTA Parties to assist in their enforcement efforts, to establish best practices for effective IPR enforcement and to set clear 'state of the art' IP enforcement rules "*in a manner that balances the rights and interest of the relevant rightholders, service providers and users*". The final wording of ACTA is not as draconic as the first leaked drafts, since the most controversial parts have been abandoned or softened and for sure it does not justify the paranoia against ACTA.[169] The only positive element from this anti-ACTA hysteria was the raising of awareness about the issue of IPRs enforcement on general.

In the light of the analysis conducted, it can be supported that the provisions of ACTA seem to be in line with the EU *acquis communautaire*, at least with regard to copyright. Is this conclusion enough to state that there is a love relationship between ACTA and copyright law in EU? Probably not! It could be described as a tolerance or even an affinity relationship but in no way a love relationship, since ACTA brought neither the disaster that the laymen were afraid of nor the Land of Promise due to the

[166] Relevant also Article 2 subsection 2 and Articles 216 et seq. TFEU.
[167] Online at http://register.consilium.europa.eu/pdf/en/11/st12/st12192.en11.pdf /accessed 01.09.2011.
[168] The EC in the documents for a Council Decision, tabled on June 24, 2011 proposing the signature and conclusion of ACTA (COM(2011) 379 final, 2011/0166 (NLE) and COM(2011) 380 final, 2011/0167 (NLE)) recommended against any further review of ACTA before it is passed by the European Parliament. The proposal for a Council Decision on the conclusion of ACTA opens with an Explanatory Memorandum, noting that "*the Commission has opted not to propose that the European Union exercise its potential competence in the area of criminal enforcement pursuant to Article 83(2) TFEU. The Commission considers this appropriate because it has never been the intention, as regards the negotiation of ACTA to modify the EU acquis or to harmonise EU legislation as regards criminal enforcement of intellectual property rights. For this reason, the Commission proposes that ACTA be signed and concluded both by the EU and by all the Member States*" (cf. COM(2011) 379 final, 2011/0166 (NLE), page 3; COM(2011) 380 final, 2011/0167 (NLE), page 2).
[169] See examples online at http://www.stopacta.info/alertbox , http://www.gamma.net.nz/content/sign-wellington-declaration /accessed 01.09.2011 and http://www.laquadrature.net/wiki/Help_sign_the_Written_Declaration_12/2010_about_ACTA /accessed 01.09.2011.

compromises that reduced the force of Parties' obligations and led to an Agreement that fell short of the ambitious aims with which it begun.